SUPREME COURT OF THE UNITED STATES.

No. 181.

HUGH B. SWEENY, CHARLES E. RITTENHOUSE, HAMILTON G. FANT, JOHN L. DUFIEF, SAMUEL FOWLER, AND WILLIAM T. HERRON, PLAINTIFFS IN ERROR,

vs.

HAMILTON EASTER, JAMES H. EASTER, JOHN EASTER, JAMES W. EASTER, AND JAMES H. WEEDON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

GOVERNMENT PRINTING OFFICE.

247

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THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, or some of you, wherein Hamilton Easter, James H. Easter, John Easter, James W. Easter, and James H. Weedon are plaintiffs, and Hugh B. Sweeny, Charles E. Rittenhouse, Hamilton G. Fant, John L. Dufief, Samuel Fowler, and William T. Herron are defendants, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your hand, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in said Supreme Court, to be then and there held; and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right, and according to the laws and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, chief justice of said Supreme Court.

Issued this 10th day of June, 1862.

[L. S.] JNO. A. SMITH, *Clk.*

Filed 10th June, 1862.

DISTRICT OF COLUMBIA:

United States of America to Hamilton Easter, James H. Easter, John Easter, James W. Easter, and James H. Weedon, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States on the first Monday of December, pursuant to a writ of error filed in the clerk's office of the circuit court of the District of Columbia for the county of Washington, wherein Hugh B. Sweeny, Charles E. Rittenhouse Hamilton G. Fant, John L. Dufief, Samuel Fowler, and William T. Herron are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in

error, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. James Dunlop, chief judge of the circuit court of the District of Columbia, this 10th day of June, 1862.

JAS. DUNLOP.

Service acknowledged.

JOS. H. BRADLEY,
Att'y for Pl'ffs.

3 *Appeal bond.*

Know all men by these presents that we, Hugh B. Sweeny, Charles E. Rittenhouse, Hamilton Fant, John L. Dufief, Samuel Fowler, and William T. Herron, Z. D. Gilman, and Johnson Hellen, are held and firmly bound unto Hamilton Easter, James H. Easter, John Easter, James W. Easter, and James H. Weeden, in the sum of four thousand dollars current money; to which payment well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, und administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this ninth day of June, in year eighteen hundred and sixty-two.

Whereas lately, at a circuit court of the District of Columbia, in a suit depending in the said court, wherein the said Hamilton Easter, James H. Easter, John Easter, James W. Easter, and James H. Weeden were plaintiffs, and the said Hugh B. Sweeny, Charles E. Rittenhouse, Hamilton G. Fant, John L. Dufief, Samuel Fowler, and William T. Herron were defendants, judgment was rendered against the said defendants, and they having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Hamilton Easter, James H. Easter, John Easter, James W. Easter, and James H. Weeden, citing and admonishing them

4 to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Hugh B. Sweeny, Charles E. Rittenhouse, Hamilton G. Fant, John L. Dufief, Samuel Fowler, and William *H.* Herron shall prosecute their said writ with effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise, to be and remain in full force and virtue in law.

H. B. SWEENY. [SEAL.]
C. E. RITTENHOUSE. [SEAL.]
HAMILTON G. FANT. [SEAL.]
JOHN L. DUFIEF,
By W. D. DAVIDGE, *Att'y.* [SEAL.]
SAMUEL FOWLER,
By W. D. DAVIDGE, *Att'y.* [SEAL.]
WILLIAM T. HERRON,
By W. D. DAVIDGE, *Att'y.* [SEAL.]
Z. D. GILLMAN. [SEAL.]
JOHNSON HELLEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. D. DAVID, Jr.

I certify that the sureties in the foregoing bond are amply sufficient for the penalty thereof.

W. D. DAVIDGE.

June 10, '62.

Approved: JAS. DUNLOP.

5 *Style of court.*

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the first Monday of May, being the fifth day of the same month, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.—

Were present the Hon'ble James Dunlop, chief judge; James S. Morsell and Wm. M. Merrick, assistant judges; Ward H. Lamon, esq., marshal: John A. Smith, clerk.

Parties.

In the records of proceedings of same court, amongst others, are the following, to wit:

HAMILTON EASTER & COMP'Y *agst.* HUGH B. SWEENY, CHARLES E. RITTENHOUSE, HAMILTON G. FANT & OTHERS.

Be it remembered that heretofore, to wit, on the 17th day of January, in the year of our Lord one thousand eight hundred and sixty-one, the said plaintiffs, by Bradley & Bradley, esquires, their attorneys, prosecuted and sued forth out of the circuit court here the United States writ of *capias ad respondendum*, directed to the marshal of the District aforesaid, in the words and of the tenor following, to wit:

Capias ad respondendum.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the marshal of the District of Columbia, greeting:

6 We command you that you take Hugh B. Sweeny, Chas. E. Rittenhouse, Hamilton G. Fant, John L. Dufief, Samuel Fowler, William T. Herron, late of Washington county, if they shall be found within the county of Washington, in your said District, and them safely keep so, that you have their bodies before the circuit court of the District of Columbia, to be held for the county afore.

said, at the city of Washington, on the third Monday of Jan'y inst., to answer unto Hamilton Easter, James H. Easter, John Easter, Jas. W. Easter, James A. Weedon, in a plea of trespass on the case, &c.

Hereof fail not at your peril, and have you then and there this writ.

Witness Jas. Dunlop, esquire, chief justice of our said court, at the city of Washington, the 16th day of Jan'y, anno Domini, one thousand eight hundred and 61.

Issued the 17th day of January, 1861.

B. & B. JNO. A. SMITH, *Clk.*

Marshal's return.

At which said third Monday of January, 1861, being the day of the return of the aforegoing writ, comes into the circuit court here the said plaintiffs, by their attorneys aforesaid; and the marshal of the District aforesaid, to whom the said foregoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed to wit: "*Non est* John L. Dufief, *cepi* the others;" and they, said def'ts, being called, appear in court here, by Davidge and Ingle, esqr's. their attorneys; and thereupon the said defendants, by their said attorneys, pray that the said plaintiffs may declare against them, the said defendants, in the plea aforesaid. Whereupon it is ruled by the court here that the said plaintiffs declare against the said defendants in the plea aforesaid, or judgment will be rendered against them in default thereof; and the said plaintiffs, by their attorneys aforesaid, declare against the said defendants in the plea aforesaid, in
7 form following, to wit:

Nar.

HAMILTON EASTER & Co.
vs.
SWEENY, RITTENHOUSE, FANT & Co.

And thereupon the said plaintiffs, by Bradley & Bradley, their attorneys, complain, that whereas they, the said plaintiffs, on the 22nd day of November, 1860, at the county aforesaid, were possessed of nine several promissory negotiable notes, made, respectively, one by R. W. Carter, for the sum of six hundred and fifty-eight dollars and forty-five cents, which was due and payable on the first and fourth of December, 1860; one made by Perry & Brother, for the sum of five hundred dollars, which was due and payable on the first and fourth days of December, 1860; one made by Henry Egan, for the sum of sixteen hundred and fifty dollars and eighty-three cents, which was due and payable on the seventh and tenth of December, 1860; another made by the same Henry Egan, for the sum of sixteen hundred and fifty dollars and eighty-two cents, due and payable on the 10 and 13 December, 1860; one made by William Tucker, for the sum of two hundred and forty-five dollars and eleven cents, due and payable on

the 9th and 12th December, 1860; one made by Hooe & Co., for the sum of four hundred and thirty-five dollars and seventy cents, due and payable on the 12 and 15 December, 1860; one made by J. W. Colley & Co., for four hundred and sixty-four dollars, due and payable on the 13 and 16th December, 1860; one made by William R. Riley & Co., for four hundred and seventeen dollars, due and payable on the 15th and 18th of December, 1860; and one made by Wm. M. Shuster & Co., for two hundred and forty-seven dollars and twenty-eight cents due, and payable on the 18th and 21 December, 1860; amounting in the whole to the sum of, and being of the value of, six thousand two hundred and sixty-nine dollars and nineteen
8 cents, each and every of which said several notes were made payable to the said plaintiffs by the name of H. Easter & Co., or order, and were the property of said plaintiffs; and the said plaintiffs being so possessed of the said promissory notes, and of each and every of them, as their property, goods, and chattels, and neither of the said notes being then due or paid, or otherwise in any manner satisfied, in whole or in part, to wit, on the said twenty-second day of November, in the year 1860, at the county aforesaid, out of their hands and possession casually lost the said promissory notes, and each and every of them, and the said promissory notes and each and every of them afterwards, on the day and year last aforesaid, at the county aforesaid, came to the hands and possession of the said defendants by finding.

Nevertheless, the said defendants, well knowing the said promissory notes and each and every of them to be the property and the goods and chattels of the said plaintiffs, and to them of right to belong and appertain, although often thereto required, have not delivered the same or any one or more of them to the plaintiffs, but afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, converted and disposed of the same, and of each and every of them, to their own use, to the damage of the plaintiffs ten thousand dollars, and therefore they sue.

BRADLEY *for Pl'f.*

Memorandum.

The clerk will please to dismiss so much of this case as relates to the note of Hooe, Bro. & Co., for five hundred and thirty-five dollars and seventy cents, due the twelfth and fifteenth of December, 1860; and also so much as relates to the note of W. M. Shuster & Co., for two hundred and forty-seven dollars and twenty-eight cents, due the eighteenth and twenty-first December, 1861; the proceeds of said two notes having been claimed by said plaintiffs in an
9 action pending in the court in Baltimore against the defendants before the nar in this case was filed.

JOS. H. BRADLEY, *Pl'ffs' Atty.*

Filed 21 September, 1861.

Rule plea.

And thereupon said plaintiffs, by their attornies aforesaid, pray that the defendants may answer to the declaration aforesaid of them, the said plaintiffs, in the plea aforesaid. Whereupon it is ruled by the court here that the said defendants answer to the declaration aforesaid of the said plaintiffs in the plea aforesaid, or judgment by the court here will be entered against them in default thereof.

Non-assumsit.

And the said *said* defendants, by their attorneys aforesaid, defend the wrong and injury, when, and so forth, and say that they did not assume upon themselves in manner and form, as the aforesaid plaintiffs above against them have complained; and of this they put themselves upon the country.

Issue joined.—Veniri facia.

And the said plaintiffs, in like manner, and so forth; therefore let a jury thereon appear before the court here on the first Monday of May next, by whom, &c., and who neither, &c., to recognise, &c., because as well, &c., the same day is given to the said parties, then and there, &c.

To May term, 1861.

And now, at this day, to wit, the said first Monday of May, 1861, come again into the circuit court here, as well the said plaintiffs, by their attorneys aforesaid, as the said defendants, by their attorneys aforesaid; and thereupon the said plaintiffs, by their solicitors aforesaid, dismiss this suit as to Hooe, Bro. & Co.'s note for $435 70, and also as to the note of W. M. Shuster & Co. for $247 28; and thereupon and afterwards said cause was regularly continued from term to term, with the consent of the parties, by their said attornies, and by order of the court, until the May term of said court, in the year one thousand eight hundred and sixty-two.

Appearance to May term, 1862.

And now, to wit, the first Monday of May, in the year 1862, come into court here, as well the said plaintiffs, by their said attorneys, as the said defendants, by their attornies aforesaid; whereupon, for trying the issue aforesaid, it is ordered by the court here that twelve persons, from the pannel of petit jurors returned to the court here by the marshal of the District aforesaid, be drawn by ballot; and thereupon the twelve persons so drawn, being called, come, to wit:

Jury.

1. Wm. Choppin.
2. John E. Neale.
3. Edward Deeble.
4. Zadock Williams.
5. Val. Blanchard.
6. Charles B. Cluskey.
7. Thomas Orme.
8. Terence Drury.
9. Charles Sioussa.
10. Thomas E. Jacobs.
11. James Dobbin.
12. William King.

Verdict.

Who, being empannelled and sworn to say the truth, in the premises, upon their oath do say that the said defendants did assume upon themselves, in manner and form as the plaintiffs within against
11 them have complained; and they assess the damages of the said plaintiff sustained by occasion of the non-performance of the promise and assumption aforesaid to the sum of sixteen hundred and ninety-two dollars and eight cents, with interest from the tenth day of January, eighteen hundred and sixty, until paid.

Damages.—Judgment.—Costs.

Therefore it is considered by the court here that the said plaintiffs recover against the said defendants as well the said sum of sixteen hundred and ninety-two dollars and eight cents, with interest from the tenth day of January, eighteen hundred and sixty, until paid, the damages aforesaid, by the jurors aforesaid, in form aforesaid, assessed to be sustained by occasion of the non-performance of the promise and assumption aforesaid, as the sum of thirty dollars and forty-two cents by the court here, unto them, the said plaintiffs, on their assent adjudged, for their costs and charges by them about their suit in that behalf laid out and expended. And the said defendants in mercy, &c.

Mem.

Mem.—Before the jurors aforesaid withdrew from the bar of the court here, the said defendants, by their attorneys aforesaid, filed in court here the following bills of exceptions, to wit:

12 *Def'ts' 1st bill of exceptions.*

SWEENY, RITTENHOUSE, FANT & CO. *ads.* HAMILTON, EASTER & CO. } No. 299, Trials. May term, 1862.

At the trial of this cause, the plaintiffs, to maintain the issue on their part joined, offered to show, by Richard H. Harris, one of the firm of Harris & Sons, bankers, of the city of Baltimore, Md., that the notes mentioned and described in the declaration, the same being produced in court, and being payable to the order of the plaintiffs, and by them endorsed in blank, and below such endorsement of the plaintiffs, being endorsed by Harris & Sons, as follows:

Pay Sweeney, R., F. & Co., or order, for collection.

SAM. HARRIS & SONS,

were, on the twelfth day of November, 1860, the property of the plaintiffs, who placed them on said day in the bank of said Harris & Sons, to be transmitted to the city of Washington, D. C., for collection; and that said notes continued to be the property of the plaintiffs to the bringing of this suit; and that the said firm of Harris & Sons, by whom said notes were transmitted to the defendants, were not, at the time of said transmission or since, the owners of said notes, or interested therein, but were merely agents for their collection; and to the competency of said Harris to testify to the facts aforesaid the defendants, by their counsel, objected; which objection
13 was overruled, and said Harris held to be a competent witness; to which ruling the defendants except, and pray the court to sign, seal, and cause to be enrolled this their first bill of exceptions; which is accordingly done this 24th day of May, 1862. A. D. 1862.

JAS. DUNLOP. [SEAL.]
[SEAL.]
WM. M. MERRICK. [SEAL.]

Evidence of R. H. Harris.

And thereupon the plaintiffs gave evidence by said Richard H. Harris to prove.

H. EASTER & Co.
v.
SWEENY, RITTENHOUSE, FANT & Co.

On the trial of this cause the plaintiff offered and read in evidence (the handwriting being admitted) the three original promissory notes, with the endorsements thereon, as follows, being part of the same notes in controversy in this suit, and then gave evidence by Richard H. Harris, one of the firm of Sam. Harris & Sons, endorsers of said notes, to prove by said witness the course of dealing between the said firms of S. Harris & Sons and Sweeny, Rittenhouse, Fant & Co., and for what purpose the said endorsements on the said notes, to wit: "Pay Sweeny, R., F. & Co., or order, for collection," was put there, and how the said endorsement was understood and
14 placed between the said houses of S. Harris & Sons and the defendants; that each and every of the notes claimed in this action is the property of the plaintiffs, and always has been, and said Harris & Sons received the same as the agents for the plaintiffs, and remitted them as the property of the plaintiffs, to be collected by the defendants for the use and benefit of the plaintiffs, with the endorsement as aforesaid, and letters of advice as follows, that whenever, and as they, said Harris & Sons, remitted paper having time to run belonging to themselves, to said defendants for collection, they uniformly endorsed the same in the annexed form, "Pay to the order of, without any words of limitation or restriction in such endorsement;" that uniformly in notes deposited by the plaintiffs with said Harris & Co., to be remitted to defendants for collection, it was the usage and custom of Harris & Co., either by a mark on the papers

themselves or by the letter of advice transmitting the paper for collection, to notify the defendants not to protest the same, and that the orders in controversy were each and every of them either so marked, or the letter of advice contained such instruction; that no accounts were ever made out by Harris & Co., and remitted to defendants, showing the dealings between the said parties; nor did either of said parties at any time permit balances to remain in the hands of the other to be covered by collections thereupon
15 to be made, nor did either of said parties draw on the other on the strength of collections of negotiable paper remitted or expressed to be remitted; that in point of fact, so far as Harris & Son were concerned, there was no understanding or agreement between them and the defendants, that either party should hold balances against the other to be met by collections for the other, or to await remittances from the other of negotiable paper for collection, and he never heard any such claim from the defendants until after this controversy arose; that the business of said Harris & Co. with defendants regarding the individual property of said Harris & Co., was entirely distinct from and carried on by correspondence and remittances entirely separate from their business as collecting agents, and, in point of fact, they did, on the same day when the notes in controversy were remitted by them and by the same mail, remit paper of their own and on their account in letter and by endorsements as follows, (copied in page ——;) that when collections were made by defendants they were immediately remitted to Harris & Sons, or put to debit of defendants by Harris & Sons; that the private transactions between Harris & Sons and the defendants were carried on by correspondence in separate letter books by Harris & Sons; that the business of Harris & Sons with defendants, except their busi-
16 ness as agents in collecting, was for the convenience of defendants, on whom drafts were not drawn by Harris & Co. except for small sums, and never with reference to the collection business; and the business was originally opened by defendants with Harris & Co., by two letters of the 1 Oct., 1857, as follows, (copied in page ——;) that at that time and for a long — after, the said Harris & Sons did not remit any paper for collection to defendants, but the said remittance of the 1 Oct., 1857, was followed up by various other remittances from defendants to Harris & Sons, leaving balances on their hands on which defendants would draw, and by the transmission of uncurrent funds, to be held and employed for the benefit of defendants, but without any reference to collections to be made by defendants of paper which might be hereafter remitted to them for collection by said Harris & Co., but by degrees the said defendants began to enter to the credit of the said Harris & Sons the proceeds of paper received from them, as the same was collected, and advise them of such collectors, and instead of drawing on Harris & Sons for the amounts remitted to them, the collections in the hands of defendants employed by defendants to reduce such balances, and the difference was from time to time caused by
17 other remittances, but the account was kept and rendered by

defendants only. And further, that on the day Harris & Son failed, they held other paper to a large amount which had been remitted by defendants, transferred the same to another house, whereas if they had retained the same, the amount so transferred would very nearly have covered the amount of the notes in controversy. And also as to certain other paper in their hands at the time of their failure, being a draft or check on Harris & Son, remitted by defendants, the defendants claimed that the same should have been protested by Harris & Son, and not passed to the credit of defendant.

Cross-examination of Harris.

And on cross-examination the witness Harris testified that the practice of the house of Harris & Sons, in transmitting negotiable paper to the defendants, of distinguishing between paper discounted by them and that sent on behalf of their customers, by endorsing the former generally and the latter "Pay to the order of Sweeny, Rittenhouse, Fant & Co., for collection," and also, either by a mark on the paper or by the letter of advice transmitting it, notifying defendants not to protest the former, was not uniform, but depended on the wish of the customer depositing paper not discounted, and that it extended only to paper having time to run, and did not apply
18 to checks or sight drafts or other cash paper, as to which paper the business was managed as if Harris & Sons were the absolute owners thereof; and that said practice was only the private practice of said Harris & Sons for their own convenience, and that the witness never informed the defendants of the same, nor did he know that they were informed thereof; nor did the witness inform the defendants, nor, so far as he knows, did they have any information as to Harris & Sons' private practice of keeping distinct the business relating to discounted time paper and that relating to time paper deposited for collection by customers, by the use of separate letter books or otherwise, as testified to by him. And the said witness further testified, on cross-examination, that the paper transferred to another banking-house was not received by Harris & Sons until after their failure, though transmitted by the defendants on the day before the failure, but the letter of transmission was revoked by telegraphic dispatch on the day of said failure.

And the defendants, to maintain the issue on their part joined, gave evidence to the jury to prove that since October, 1858, there had been mutual and extensive dealings between them and said house of Harris & Sons; that the said Harris & Sons trans-
19 mitted from time to time to the defendants bills, notes, checks, and sight and time drafts, and other negotiable paper for collection; and that, by the uniform course of dealing between the parties, said Harris & Sons were treated and dealt with as the owners of the paper so transmitted; that accounts current were kept by the defendants in which the proceeds of such paper were, when received, credited to said Harris & Sons, and they were charged with all expenses; and that said accounts current were transmitted monthly to

said Harris & Sons and acquiesced in by them; that upon the credit of such negotiable paper so transmitted or expected in the ordinary course of business, and of such course of dealing, large drafts were drawn from time to time by said Harris & Sons upon the defendants and paid by the latter, and that upon such credit, large ascertained balances were allowed to remain in the hands of said Harris & Sons, to be met by the proceeds of such negotiable paper, and that, in all respects, the paper so transmitted was regarded, treated, and dealt with by the defendants and said Harris & Sons as the property of the latter; and that a similar course of dealing obtained in regard to negotiable paper transmitted by deft's to said Harris & Sons; that
20 Harris & Sons became insolvent on the twenty-third day of November, 1860, and then owed the defendants, on general account, a balance of $2,100, for which balance a lien on the notes in controversey is claimed by the defendants; that the defendants had no notice or knowledge that the negotiable paper transmitted to them as aforesaid was not the property of said Harris & Sons, and that the notes in controversey were transmitted to them on the twelfth day of November, 1860, and were regarded, treated, and dealt with as the property of said Harris & Sons, and that the defendants had no notice or knowledge, until after the insolvency of said Harris & Sons, that said paper was not their property, or that the plaintiffs had any interest in or claim to the same; and that the balance due the defendants, on general account, at the time of the insolvency of said Harris & Sons, had been suffered to remain undrawn on the faith and credit of the paper in controversey, and the course of dealing aforesaid. The defendants further gave evidence tending to prove that said Harris & Sons, on the twenty-second day of August, in the year 1860, when there was a balance against them, on general account, of $3,826 94. had drawn on the defendants for $244 08, the defendants being then the holders of a large amount of negotiable paper endorsed and transmitted in the same manner as the
21 notes in controversey, and among it certain notes endorsed by the plaintiffs in blank, and transmitted in a manner similar to the notes in controversey.

And the defendants offered evidence, by witnesses largely engaged in the business of banking, that by the general custom and usage of bankers. negotiable paper transmitted to a bank for collection and endorsed as the notes in controversey, and accompanied by a similar letter of instructions, would be held and treated as the property of the bankers transmitting them ; and that the notes in controversey, so endorsed and transmitted, would have been held and treated by them as the property of Harris & Sons. And thereupon the court instructed the jury as follows:

Instruction of the court to the jury.

1. If from the whole evidence before them the jury shall find that Sweeney, Rittenhouse, Fant & Co., the defendants in this action, at the time of the mutual dealings between them and S. Harris & Sons,

had notice that S. Harris & Sons had no interest in the notes in question, and that they transmitted them for collection merely as agents, then the defendants are not entitled to retain against the plaintiffs for the general balance of their account with Sam. Harris & Sons.

2. And if the defendants had *not* notice that Sam. Harris & Son were merely agents, but regarded and treated them as the owners of the paper transmitted, yet the defendants are *not* entitled to retain against th e real owners *unless* credit was given to Harris &
22 Sons, or balances suffered to remain in their hands to be met by the negotiable paper transmitted or expected to be transmitted in the usual course of dealing between them.

3d. But if the jury find that in the dealings mentioned in the testimony the defendants regarded and treated Harris & Sons as the owners of the negotiable paper which they transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made, or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of Harris & Sons, to be met by the proceeds of such negotiable paper, then the defendants are entitled to retain against the plaintiffs for the balance of account due from Sam. Harris & Sons.

And the def'ts prayed the court to instruct the jury as follows :

Judge's opinion, marked A.

And the private practice of Harris & Sons, in transmitting negotiable paper having time to run, whereby they intended to distinguish between negotiable paper discounted by them and that received for collection, as given in evidence by the witness Harris, is not competent to charge the defendants with notice as to whether the paper in controversy was discounted by and belonged to the said Harris
23 & Sons, or was transmitted for collection, unless the ju y shall find, from all the evidence in the case, that the defendants had knowledge of such private practice ; and in the absence of such knowledge, the def'ts were authorized to treat such paper according to what it purported on its face, and the general custom of bankers in the District of Columbia and elsewhere, offered in evidence, which instruction the court refused to give, having instructed the jury in 1, 2 & 3, covering the matter involved in this prayer; to which refusal the defendants, by their counsel, except and pray the court to sign, seal and caused to be enrolled this his 2d bill of exceptions, which is accordingly done this 28th day of May, 1862.

JAS. DUNLOP. [L. S.]
JAS. S. MORSELL. [L. S.]
[L. S.]

Writ of error produced.

And whereas afterwards, to-wit, on the 10th day of June, in the year 1862, the said defendants, by their attorneys aforesaid, produce and file in court here the United States writ for the correcting of

errors, of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia for the county of Washington, and in pursuance thereof, and according to the
24 form and effect of the law, in such cases made and provided.

A transcript of the record of proceedings aforesaid, and a copy of the appeal bond hereto annexed, is hereby transmitted to the Supreme Court accordingly.

Clerk's certificate and seal.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court for the county of Washington this 28th day of November, 1862.

[SEAL.]

JNO. A. SMITH, *Clerk.*

Supreme Court of the United States.

SWEENY, RITTENHOUSE, FANT & CO. *vs.* HAMILTON EASTER & CO. } No. 181. Dec. Term, 1863.

This was an action of trover, brought by the Defendants in Error against the Plaintiffs in Error, for the recovery of the value of certain promissory notes. The facts were briefly as follows:

The Plaintiffs below being the holders of certain notes set out in the nar placed the same in the hands of Harris & Sons, bankers, of Baltimore, to be transmitted to Washington, D. C., for collection, and endorsed said notes *in blank*, and below such endorsement Harris & Sons endorsed as follows:

"Pay Sweeny, R., F. & Co., or order for collection,

SAML. HARRIS & SONS." R. 7.

At the trial the Plaintiffs offered to show by Richard H. Harris, one of the firm of Harris & Sons, that the Plaintiff's were the owners of the notes, and that the firm of Harris & Sons were merely agents for the transmission of such notes for collection, and to such testimony the Defendants objected on the ground that it was not competent for Harris & Sons, endorsers of commercial paper, to contradict the ownership which the notes on their face imported. This objection was overruled by the Court, and gives rise to the first exception. R. 7. 8.

This witness was the only one introduced by the Plaintiffs. On being held competent he testified that the Plaintiffs after their endorsement in blank continued to be the owners of the notes, and that such endorsement was merely to enable Harris & Sons to collect.

He further testified that Harris & Sons in remitting discounted paper, having time to run, to the Defendants, endorsed the same generally, "Pay to the order of," without saying for collection, and that where paper was not discounted, but deposited for collection, it was the practice of Harris & Sons, to notify the Defendants not to protest the same, either by a mark on the paper or by the letter of advice, and that the private transactions between Harris & Sons and the Defendants were kept distinct from their business as collection agents, and were carried on by Harris & Sons, in separate letter-books. R. 6. 10.

On cross-examination the witness testified, that the practice of Harris & Sons, of distinguishing in transmitting paper to the Defendants, between paper discounted by them and that sent on behalf of their customers, by endorsing the the former generally, and the latter, "Pay to the order of S., R., F. & Co., *for collection*," and also by notifying Defendants not to protest the former, either by a mark on the paper itself or by the letter of advice, was *not uniform*, but depended on the wish of the customer depositing the paper not discounted, and that it extended only to paper having time to run, and did not apply to checks, or sight drafts, or other cash paper, as to which the business was managed, as if Harris & Sons were the absolute owners of the paper; and that said practice *was only the private practice of Harris & Sons, and that witness never informed Defendants of the*

same, nor did he know they were ever informed thereof; nor, so far as he knows, did they ever have any information as to the practice of Harris & Sons of keeping distinct the business relating to discounted time paper and to time paper belonging to customers, by the use of separate letter books, or otherwise, as testified by him. R. 10.

The defendants then proved that since October 1859, there had been mutual and extensive dealings between them and said house of Harris & Sons; that the said Harris & Sons transmitted, from time to time, to the defendants' bills, notes, checks, and sight and time drafts, and other negotiable paper for collection; and that, by the uniform course of dealing between the parties, said Harris & Sons, were treated and dealt with as the owners of the paper so transmitted; that accounts current were kept by the defendants, in which the proceeds of such paper were, when received, credited to said Harris & Sons, and they were charged with all expenses; and that said accounts were transmitted monthly to said Harris & Sons, and acquiesced in by them; that upon the credit of such negotiable paper so transmitted or expected in the ordinary course of business, and of such course of dealings, large drafts were drawn from time to time by said Harris & Sons, and paid by the latter, and that, upon such credit, large ascertained balances were allowed to remain in the hands of said Harris & Sons, to be met by the proceeds of such negotiable paper; and that, in all respects, the paper so transmitted was regarded, treated, and dealt with by the Defendants, and said Harris & Sons, as the property of the latter; and that a similar course of dealing obtained in regard to negotiable paper transmitted by Defendants to said Harris & Sons; that Harris & Sons

became insolvent on the twenty-third day of November, 1860, and then owed the defendants, on general account, a balance of $2,100, for which balance a lien on the notes in controversy is claimed by the defendants; that the Defendants had no notice or knowledge that the negotiable paper transmitted to them as aforesaid was not the property of said Harris & Sons, and that the notes in controversy were transmitted to them on the twelfth day of November, 1850, and were regarded, treated, and dealt with as the property of said Harris & Sons, and that the Defendants had no notice or knowledge until after the insolvency of said Harris & Sons, that said paper was not their property, or that the Plaintiffs had any interest in or claim to the same; and that the balance due the Defendants, on general account, at the time of the insolvency of said Harris & Sons, had been suffered to remain undrawn on the faith and credit of the paper in controversy, and the course of dealing aforesaid.

The Defendants further gave evidence tending to prove that said Harris & Sons, on the twenty-second day of August, in the year 1860, when there was a balance against them on general account, of $3,826 94, had drawn on the Defendants for $244 08, the Defendants being then the holders of a large amount of negotiable paper, endorsed and transmitted in the same manner as the notes in controversy, and among it certain notes endorsed by the Plaintiffs in blank, and transmitted in a similar manner to the notes in controversy. And the Defendants offered evidence, by witnesses largely engaged in the business of banking, that by the general custom and usage of bankers, negotiable paper transmitted to a bank for collection, and endorsed as the notes in controversy, and accompanied by a similar letter of instruction, would

be held and treated as the property of the bankers transmitting them; and that the notes in controversy, so endorsed and transmitted, would have been held and treated by them as the property of Harris & Sons.

The Defendants prayed the following additional instruction:

That the drivate practice of Harris & Sons in transmitting negotiable paper, having time to run, whereby they intended to distinguish between negotiable paper discounted by them and that received for collection, as given in evidence by the witness Harris, is not competent to charge the Defendants with notice as to whether the paper in controversy was discounted by and belonged to the said Harris & Sons, or was transmitted for collection, unless the jury shall find from all the evidence in the case, that the Defendants had knowledge of such private practice; and in the absence of such knowledge, the Defendants were authorized to treat such paper according to what it purported on its face to be, and the general custom of bankers in the District of Columbia and elsewhere' offered in evidence, which instruction the Court refused, and hence the second Exception. R. 12.

The verdict and judgment will be found, R. 7.

POINTS.

I. The Court erred in admitting the testimony of Harris, he being one of the firm of Harris & Sons, the endorsers of the notes.

No rule of evidence is more firmly established by the decisions of this Court than that a party to commercial paper

is not a competent witness to invalidate it, or to contradict or vary its legal import.

Bank of the United States vs. Dunn, 6 Pet., 51.59.

Bank of the Metropolis vs. Jones, 8 Pet., 12.15.

Henderson vs. Anderson, 3 How, 73.78.80.

Smyth vs. Strader, 4 How, 404.413.417.

Saltmarsh vs. Tuthill, 13 How, 229.

Every endorsement of a note in contemplation of law involves, first, that the endorser has a good title to the note, and secondly, that he transfers such title to the endorsee.

Story on Promissory Notes, S. 135, &c.

In this case the plain import of the endorsement in blank of Hamilton, Easter & Co., as well as that of the endorsement of Harris & Sons, to the plaintiffs in error, was allowed to be varied and contradicted by a party to the paper.

The witness was permitted to testify, that Hamilton, Easter & Co., who, according to the face of the paper, had transferred their title, were in reality the owners, and that Harris & Sons, who, according to the face of the paper, were the owners in reality, were not such.

In the case of the Bank of the Metropolis against the New England Bank, twice before this Court, reported in 1 How., 234, and 6 How., 212, it was held by this Court that where there were mutual dealings between two banks as here, and balances were suffered to remain uncalled for, on the faith of paper transmitted and to be transmitted from time to time for collection, that there was the same lien upon paper held by the collecting bank at the time of the insolvency of the transmitting bank as if an advance had actually been made by the former to the latter upon such paper.

And it was further held that the paper transmitted for

collection was *prima facie*, the property of the bank transmitting it, and that the collecting bank had a right so to treat it in the absence of notice to the contrary, and was under no obligation to inquire whether it was held as agent or owner.

It will be observed that in the above case the letters of advice sent to the collecting bank stated that the paper was transmitted "for collection," but this Court held that notwithstanding the collecting bank had a right to treat the paper as the property of its correspondent.

In the present case it is obvious that the words, "for collection," endorsed upon the paper only prevented the transfer of the paper but threw no light upon tae subject of ownership.

II. The Court also erred in refusing to instruct the jury that the private practice of Harris & Sons of distinguishing between paper owned by them and such as they held as agents was not competent evidence to charge the Plaintiffs in Error with notice that the paper in question was not the property of Harris & Sons, unless the Plaintiffs in Error knew of such private practice.

A proposition so elementary requires no authority. The witness, and the only witness, had sworn it was a private practice only, and that he never informed the Plaintiffs in Error of it, nor, so far as he knew, were they ever informed

of it. The reason assigned by the Court for not giving the instruction prayed, to wit: that they had in the instructions given instructed the jury in relation to the matter involved in the rejected prayer was founded in error. On looking at the instructions given this Court will find them an exact copy of those framed by this Court for the guidance of the Circuit Court in the case of the Bank of the Metropolis against the New England Bank. Those instructions merely defined the respective rights of the parties. They do not touch the question of the character of the evidence from which notice could be inferred.

The Court below had instructed the Jury that the Plaintiffs in Error were entitled to retain, unless they had notice that the paper was not the property of Harris & Sons, and if they had given credit upon faith of the paper, but they had not stated to the Jury, that it was not competent to infer such notice from the private practice of Harris & Sons, if unknown to the Plaintiffs in Eerror.

The instructions given relate to the facts to be found by the Jury to support a verdict for either party. The rejected prayer related exclusively to the rule of evidence to guide the Jury in the ascertainment of one of those facts to wit; that of notice.

W. D. DAVIDGE,
For Plaintiffs in Error.

IN THE SUPREME COURT.

SWEENY, RITTENHOUSE, FANT & CO. *vs.* HAMILTON EASTER & CO.	No. 181. December T. 1863. *In Error,* IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

This is an action on the case brought in the Circuit Court of the District of Columbia, by the Defendants in Error, agains the Plaintiffs in Error, to recover the value of certain promissory notes belonging to them, which they had placed in the hands of Harris & Sons, to be forwarded to Washington, for collection, and for no other purpose. Harris & Sons endorsed them, "*pay Sweeny, R., F. & Co., or order for collection. Sam. Harris & Sons;*" and forwarded them to Sweeny, Rittenhouse, Fant & Co., and before the notes fell due, failed, indebted to the latter company, and these last claimed the right to hold all the paper forwarded to them by Harris & Sons, and among others, the paper in question, to cover any general balance which might be found due to them on settlement with Harris & Sons.

At the trial of the cause the Plaintiffs offered Richard H. Harris, one of the firm of Harris & Sons, to prove that the notes in controversy were the property of Plaintiffs, and that Plaintiffs had deposited them with Harris & Sons for collection only. The defendants objected to him on the ground of his being one of the endorsers. The Court over-

ruled the objection, and this constitutes the first exception. P. 7 and 8.

The evidence on both sides is very well condensed in pages 8, 9, 10, and 11 of the record, and the instructions given by the Court will be found at pages 11 and 12.

The Court gave almost in their very terms the instructions suggested by this Court, in The Bank of the Metropolis against the New England Bank. 6 How., 227.

No exception was taken to these instructions; but the Plaintiffs in error asked the further instruction, that the private practice of Harris & Sons, in transmitting negotiable paper having time to run, whereby they intended to distinguish between negotiable paper discounted by them and that received for collection, as given in evidence by the witness Harris, is not competent to charge the defendants with notice as to whether the paper in controversy was discounted by and belonged to the said Harris & Sons, or was transmitted for collection, unless the jury shall find from all the evidence in the cause that the defendants had knowledge of such private practice; and in the *absence of such knowledge*, the defendants were authorized to treat such paper according to what it purported on its face, and the general custom of the bankers in the District of Columbia and elsewhere offered in evidence."

This the Court refused to give, and these two exceptions are the only subjects assigned as error.

POINT I.

The Court was right in admitting Richard H. Harris as a witness.

1. The notes were not endorsed according to the usage and custom of merchants and others, but specially endorsed.

2. They were endorsed so as to restrain their negotiability, and to give notice to every one that they were held and transmitted for collection.

3. The endorsement was notice that they were either the property of the Plaintiff, the payee, and last endorser, or the property of Harris & Son, with which they did not mean to part by that endorsement, and the Defendants took them with that notice.

4. In Overton *vs.* Tyler, 3 Barr., 348, Ch. J. Gibson says: "*But a negotiable bill or note is a courier without luggage.*" * * "A memorandum to control it, though endorsed upon it, would be incorporated with it, and destroy it." "For collection" is luggage which it could not carry.

5. The witness had a completely balanced interest.

II.

1. The instruction asked by Defendants, and refused by the Court below limits the direction of the Court to the fact that they had *knowledge of the private practice* of Harris & Sons, in endorsing paper deposited with them for collection and excludes every other source or means of knowledge that the paper claimed by Plaintiffs was their property and never had been the property of Harris & Sons, and asks the Court to instruct the jury that in the absence of such knowledge, that is *of the alleged private practice of Harris & Sons*, the Defendants had a right to treat such paper according to what it purported on its face, &c.

The Court could not have given such an instruction without invading the province of the jury, and determining the weight of the other evidence in the cause, and on this ground were right in refusing the instruction.

2. The Court had already submitted the cause to the jury on instructions *omni exceptione major*, and this instruction